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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

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PETITIONER'S OPENING BRIEF.

Opinions Below

The opinion of the Court of Appeals is reported at 497 F.2d 1160 (9th Cir. 1974) and appears in Appendix A to the Petition for Writ of Certiorari. The opinion rendered by the United States District Court for the Central District of California is reported as *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972), and is reprinted in Appendix B to the Petition for Writ of Certiorari. The prior opinion of the California Court of Appeal disposing of respondent Jones' identical claim on state habeas corpus is reported as *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971), *hrg. denied* by California Supreme Court on August 4, 1971, and is reprinted in Appendix C to the Petition for Writ of Certiorari.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 15, 1974. This petition for certiorari was filed on July 8, 1974, and was granted on October 21, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Was respondent Gary Steven Jones placed twice in jeopardy when the California juvenile court, after a finding of delinquency and upon determining that this minor was unfit for treatment as a juvenile, waived jurisdiction and directed the district attorney to file criminal charges in adult court?

Constitutional Provisions Involved

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis added.)

United States Constitution, Amendment XIV, Section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions Involved

For purposes of clarity, the four principal provisions of the California Juvenile Court Law pertinent to this case are set forth verbatim as footnotes in the Statement of the Case which follows. Additional relevant statutes are:

California Welfare and Institutions Code Section 606:

> "When a petition has been filed in a juvenile court, the minor who is the subject of the petition shall not thereafter be subject to criminal prosecution based on the facts giving rise to the petition unless the juvenile court finds that the minor is not a fit and proper subject to be dealt with under this chapter and orders that criminal proceedings be resumed or instituted against him."

California Welfare and Institutions Code Section 607:

> "The [juvenile] court may retain jurisdiction over any person who is found to be a ward or dependent child of the juvenile court until such ward or dependent child attains the age of 21 years." (Brackets added.)

California Welfare and Institutions Code Section 1730:

> "(a) No person may be committed to the [California Youth] Authority until the Authority has

certified in writing to the Governor that it has approved or established places of preliminary detention and places for examination and study of persons committed, and has other facilities and personnel sufficient for the proper discharge of its duties and functions.

"(b) Before certification to the Governor as provided in subsection (a), a court shall, upon conviction of a person under 21 years of age at the time of his apprehension, deal with him without regard to the provisions of this chapter." (Brackets added.)

California Welfare and Institutions Code Section 1731.5:

"After certification to the Governor as provided in this article a court may commit to the authority any person convicted of a public offense who comes within subdivisions (a), (b), and (c), or subdivisions (a), (b), and (d), below:

"(a) Is found to be less than 21 years of age at the time of apprehension.

"(b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment.

"(c) Is not granted probation.

"(d) Was granted probation and probation is revoked and terminated.

"The Youth Authority shall accept a person committed to it pursuant to this article if it believes

that the person can be materially benefited by its reformatory and educational discipline, and if it has adequate facilities to provide such care."

California Welfare and Institutions Code Section 1769:

"Every person committed to the authority by a juvenile court shall be discharged upon the expiration of a two-year period of control or when the person reaches his 21st birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800)."

California Welfare and Institutions Code Section 1771:

"Every person convicted of a felony and committed to the authority shall be discharged when such person reaches his 25th birthday, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800) or unless a petition is filed under Article 5 of this chapter. In the event such a petition under Article 5 is filed, the authority shall retain control until the final disposition of the proceeding under Article 5."

California Welfare and Institutions Code Section 1800:

"Whenever the Youth Authority Board determines that the discharge of a person from the control of the Youth Authority at the time required by Section 1769, 1770, 1770.1, or 1771, as applicable, would be physically dangerous to the public because of the person's mental or physical deficiency, disorder, or abnormality, the board, through its

chairman, shall make application to the committing court for an order directing that the person remain subject to the control of the authority beyond such time. The application shall be filed at least 90 days before the time of discharge otherwise required. The application shall be accompanied by a written statement of the facts upon which the board bases its opinion that discharge from control of the Youth Authority at the time stated would be physically dangerous to the public, but no such application shall be dismissed nor shall an order be denied merely because of technical defects in the application."

Statement of the Case

On February 9, 1971, a petition was filed in the Juvenile Court of Los Angeles County Superior Court alleging that respondent Gary Steven Jones was a person described by section 602 of the Welfare and Institutions Code,[1] in that he had committed an act which if committed by an adult, would constitute a violation of California Penal Code section 211 (robbery). A detention hearing was held, and respondent was de-

[1]Unless otherwise indicated, all further references to California statutes will be to the California Welfare and Institutions Code. As of the date of filing of the petition in this case, section 602 provided:

"Any *person* under the age of *21* years *who* violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, which may adjudge such person to be a ward of the court." (Emphasis added.)

An amendment in 1971 lowered the jurisdiction age from 21 to 18. A 1972 amendment added "who is" after "person" and substituted "when he" for "who" before "violates."

tained pending a hearing on the petition. [*See* App. pp. 15-18.]

On March 1, 1971, a "jurisdictional hearing" was held pursuant to section 701.[2] At the conclusion of this hearing, the juvenile court found that the allegations of the petition were true and that respondent was a person described by section 602. The proceedings were continued for a dispositional hearing pursuant to section 702.[3] [App. pp. 17-18.]

[2]Section 701 provides:

"At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, *proof beyond a reasonable doubt* supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made." (Emphasis added.)

A 1971 amendment effective subsequent to respondent's jurisdictional hearing, substituted "proof beyond a reasonable doubt" as above for "a preponderance of evidence." Respondent Jones, however, has made no claim in the courts below that the standard of proof failed to satisfy due process under *In re Winship*, 397 U.S. 358 (1972).

[3]Section 702 provides:

"After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged

(This footnote is continued on next page)

After a hearing held on March 15 and 22, 1971, the juvenile court found, pursuant to section 707,[4]

from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

This section has not been amended since the date of respondent's hearing.

[4]Section 707 provides today, as it provided at the time of respondent's hearing, as follows:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in

that respondent was not a fit subject for treatment as a juvenile and ordered that respondent be turned over to the sheriff and district attorney for prosecution as an adult. [App. pp. 32-33.] The juvenile court based its finding of unfitness on the fact that respondent had been involved in no fewer than three armed robberies. [*Id.*] The matter was set over one month for a nonappearance report as to the progress of the adult action. [*Id.*]

On April 1, 1971, the juvenile court denied a petition for state writ of habeas corpus filed on behalf of this respondent. This petition raised the same double jeopardy issue raised in respondent's petition for writ of habeas corpus in federal district court. [App. pp. 34-35.] Thereafter respondent sought habeas corpus relief in the California Court of Appeal, Second Appellate District, Division Four. Although that court initially stayed the pending criminal prosecution of respondent, it ultimately rejected his double jeopardy claim in a published opinion. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971). On August 4, 1971, the California Supreme Court denied this re-

itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

spondent's petition for hearing with respect to the Court of Appeal decision. [App. p. 46.]

Subsequently respondent was held to answer after a preliminary hearing on the robbery charge. Thereafter an information charging one count of robbery in violation of California Penal Code section 211 was filed in the California superior court. Respondent Gary Steven Jones pleaded not guilty and submitted his case to the court, without a jury, on the transcript of the preliminary hearing. The court found respondent guilty as charged and ordered him committed to the California Youth Authority where he is currently in constructive custody on parole. [See App. pp. 48-63.] No appeal was taken from that judgment of conviction.

On December 10, 1971, respondent Gary Steven Jones, through his mother as guardian *ad litem,* filed the instant petition for writ of habeas corpus in the District Court. [App. p. 7.] After receiving a response on behalf of the California Youth Authority and after hearing argument from both parties, the District Court denied the petition for writ of habeas corpus in an order filed May 5, 1972. *Jones v. Breed,* 343 F. Supp. 690 (C.D. Cal. 1972).

Respondent filed a timely notice of appeal. [App. p. 115.] On June 21, 1972, the District Court denied respondent's application for a certificate of probable cause. [App. p. 116.]

On August 31, 1972, Chief Judge Chambers of the Ninth Circuit granted respondent's application for a

certificate of probable cause and his motion to appeal *in forma pauperis.* [App. p. 117.]

On May 15, 1974, the Ninth Circuit reversed the judgment of the District Court "with directions for the District Court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition." *Jones v. Breed,* 497 F.2d 1168 (9th Cir. 1974), reprinted as Appendix A to Pet. for Cert.

On June 18, 1974, Judge Wallace of the Ninth Circuit granted a stay of the mandate of that court under Rule 41(a) of the Federal Rules of Appellate Procedure pending the filing, consideration and disposition by this Court of the instant petition for writ of certiorari. The stay order further provided that, in the event the petition for writ of certiorari was granted, this stay was to continue pending the final disposition of the case by this Court. [App. p. 126].

On October 21, 1974, this Court granted respondent's motion for leave to proceed *in forma pauperis* and granted the petition for writ of certiorari.

Summary of Argument

Despite the holding of the Ninth Circuit below that the constitutional prohibition against double jeopardy is applicable to the juvenile courts, the question presented by this case does not require determination of the broad issue of the applicability of double jeopardy within the juvenile court system. Unlike *In re Gault,*

387 U.S. 1 (1967), *In re Winship,* 397 U.S. 358 (1970) and *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), the question here is not whether constitutional rights guaranteed to adult criminal defendants are also constitutionally mandated in delinquency adjudications within the juvenile court system. Since respondent Jones is a criminal defendant, there is no question that the prohibition against double jeopardy would bar his re-prosecution for an offense on which he had already been once in jeopardy. *Benton v. Maryland,* 395 U.S. 784, 794 (1969). Thus the issue presented by this case is whether, when the juvenile court transfers a case to the adult criminal court following an adjudication of delinquency, the adjudication of delinquency is a "prior jeopardy" which bars the subsequent criminal prosecution. Sound principles of constitutional adjudication, as well as the constitutional requirement of a live case or controversy, preclude this Court from deciding the strictly collateral question of the general applicability of the double jeopardy clause to the juvenile courts.

This Court has stated that the Fifth Amendment guarantee against double jeopardy furthers three separate constitutional policies: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense following conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). The transfer of respondent Jones from juvenile court to

adult criminal court violates none of these policies. Since no new jeopardy was involved in the adult proceedings, there was but a single "continuing jeopardy" because the proceedings against respondent Jones had not "run their full course." *Price v. Georgia,* 398 U.S. 323, 326 (1970).

Due process should not mandate the application of double jeopardy to bar the adult criminal trial of a minor transferred from juvenile court after a finding of delinquency. The effect of such an application of double jeopardy would be to engraft a cumbersome preliminary hearing procedure onto the already over burdened juvenile court structure. The duplication thus engendered could lead to an attrition of the juvenile court's ability to perform in its unique manner by reducing its flexibility as to dispositional alternatives and by generally hampering the speed of its proceedings. Moreover, the use of transfer as a dispositional alternative does not offend any principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934). The majority of states permit transfer after an adjudication of delinquency, and both the Uniform Juvenile Court Act and the Standard Juvenile Court Act do not propose to alter these statutory provisions.

ARGUMENT

I

This Case Does Not Present the Broad Question of Whether Double Jeopardy Applies to Juvenile Proceedings

In its opinion below, the Ninth Circuit initially concluded that ". . . the Fifth Amendment guarantee of double jeopardy is fully applicable to juvenile court proceedings." *Jones v. Breed,* 497 F.2d 1160, 1165 (9th Cir. 1974). *See* Appendix A to Pet. for Cert., p. 9. Petitioner Breed submits that such an expansive holding is not warranted by the narrow context of this case. Nor is it consistent with sound principles of constitutional adjudication. At the outset, therefore, it is necessary to focus attention on the real nature of the issue presented for decision by this Court.

The speculation that juvenile court proceedings might raise double jeopardy questions is of comparatively recent origin. The English experience at common law contains no meaningful precedents in this regard. At common law, children under age seven were considered incapable of possessing criminal intent, and children above that age were subjected to arrest, trial, and punishment like adult offenders. *In re Gault,* 387 U.S. 1, 16 (1967). *See also* R. Perkins, *Criminal Law* 839 (2d ed. 1969). Neither the American colonial experience nor the proceedings which led to the ratification of the Sixth Amendment suggest that "twice in jeopardy" had an original meaning which would encompass delinquency proceedings in juvenile court. To infer such intent on the part of the framers would impute to them a prescience uncommon to ordinary mortals; it was not until 1899, over a century later, that the

first juvenile court law was enacted in Illinois. *See* Act of April 21, 1899, [1899] Ill. Stat. 131, currently Ill. Rev. Stat. ch. 37, §§ 701-707.

Two recent developments have engendered discussion of the potential application of double jeopardy to juvenile delinquency proceedings. The first involved the expanded application of the Fifth Amendment guarantee against double jeopardy through its incorporation into the Due Process Clause of the Fourteenth Amendment. In *Benton v. Maryland,* 395 U.S. 784, 794 (1969), this Court held that ". . . the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . it should apply to the States through the Fourteenth Amendment." The fact that the double jeopardy clause is binding on the States is not conclusive as to the application of this provision to juvenile delinquency proceedings. In a second line of cases, this Court has held that not all of the provisions of the Bill of Rights applicable to criminal trials are obligatory in juvenile cases. The landmark *Gault* decision adopted a case-by-case approach in determining that notice, confrontation, counsel and the privilege against self-incrimination were applicable to the adjudicative hearing where the delinquency determination is made. *See In re Gault, supra,* 387 U.S. at 13-14. Later in *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), this Court held that the Sixth Amendment right to a jury trial was not constitutionally required in juvenile proceedings even though this right had been held applicable to the States in *Duncan v. Louisiana,* 391 U.S. 145 (1968).

The instant case lies at the point where these two lines of due process cases converge. In ascertaining the requirements of due process in the context of this case,

the analysis employed in neither *Benton* nor *Gault* is wholly satisfactory. Here respondent Jones was transferred from juvenile court to adult criminal court for trial. The plea of double jeopardy was interposed not to bar further proceedings in juvenile court, but to forestall his trial as an adult in criminal court. As an adult criminal defendant, *Benton v. Maryland* clearly established his right to the protection of the Fifth Amendment guarantee against double jeopardy. *Therefore, the real issue is whether due process in a criminal case requires the characterization of the pre-transfer delinquency proceedings in juvenile court as a "prior jeopardy."*

In view of the foregoing analysis, it is readily apparent that the Ninth Circuit decided a question not directly before it when it held double jeopardy to be fully applicable to juvenile court proceedings. Since respondent Jones was an adult criminal defendant when the double jeopardy issue arose, the present case was not just a further development in the progression from *Gault* to *McKeiver*. *Gault* and its progeny were all concerned with the internal applicability of various due process rights within the juvenile court. *Gault* held that notice, the rights to confrontation and counsel and the privilege against self-incrimination obtained in delinquency proceedings. *In re Winship*, 397 U.S. 358 (1970), held that the constitutional safeguard of proof beyond a reasonable doubt was also a requirement of due process in these proceedings. Most recently, *McKeiver v. Pennsylvania, supra,* concluded that the right to jury trial was not constitutionally required when the juvenile court adjudicated the issue of delinquency. The common thread in all of these cases was that the Court was concerned with the rights of the juvenile

while his case was still before the juvenile court. Since this case involves the determination of respondent Jones' rights after he had been transferred out of juvenile court, the *Gault-Winship-McKeiver* line of cases is not directly applicable to a resolution of the issue raised in this case.

The question of whether double jeopardy is partially or fully applicable to proceedings wholly within the juvenile court should be reserved for decision in a case that presents that specific factual context. Such a case might arise where the State files a second delinquency petition against a minor who has successfully defended on the merits against a prior petition alleging the same conduct or offense. *Cf. Richard M. v. Superior Court,* 4 Cal. 3d 370, 93 Cal. Rptr. 752, 482 P.2d 664 (1971) [dismissal of first petition held to be equivalent of an acquittal; double jeopardy thus held to bar further hearing on same act and offense by same minor]. *See also Winters v. New York,* 333 U.S. 507, 510 (1948).

Established principles of constitutional adjudication favor the approach of avoiding in this forum the broader issue decided by the Ninth Circuit. Ever since *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792), this Court has followed a policy of strict necessity in disposing of constitutional issues. *Rescue Army v. Municipal Court,* 331 U.S. 549, 568 (1947). See also *Broadrick v. Oklahoma,* 413 U.S. 601, 611 (1973). Thus, it has been the usual custom of this Court to avoid deciding constitutional questions unnecessary to a decision of the case at bench. *Alexander v. Louisiana,* 405 U.S. 625, 633 (1972); *Burton v. United States,* 196 U.S. 283, 295 (1905). *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Indeed, this Court has stated that it will

not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied." *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration,* 113 U.S. 33, 39 (1885). No matter how much the parties may favor the settlement of an important question of constitutional law, broad considerations of the exercise of judicial power prevent such determinations unless actually compelled by litigation before the Court. *Barr v. Matteo,* 355 U.S. 171, 172 (1957).

The requirement of a live case or controversy under Article III of the Constitution may make these principles of restraint a constitutional imperative in this case. As was observed in *Poe v. Ullman,* 367 U.S. 497, 503 (1961), the rules of strict necessity ". . . have derived from the historically defined, limited nature and function of courts and from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." Representing the interests of the State of California in this case, petitioner Breed cannot be said to be a truly "adversary" party on the question of whether double jeopardy applied to proceedings wholly within the juvenile court. The California Supreme Court has already determined that double jeopardy is applicable in proceedings before the juvenile court. *Richard M. v. Superior Court,* 4 Cal. 3d 370, 93 Cal. Rptr. 752, 482

P.2d 664 (1971). Since that holding was based on the California Constitution as well as the Fourteenth Amendment (*id.* at 375, 93 Cal. Rptr. at 756, 482 P. 2d at 668), petitioner Breed's interest in resolving this broader issue in this forum would be more academic than adverse. Regardless of the outcome in this Court, petitioner will be bound by the decision of California's highest court interpreting the California Constitution.

The limited nature of the issue before this Court having thus been demonstrated, there remains the critical question of the analysis to be employed in resolving that limited issue. As Professor Carr has observed:

> ". . . [a] more difficult analysis is necessary to determine the reach of double jeopardy doctrine into practices which are unique to the juvenile court and for which there are no functional equivalents in adult prosecutions. . . .
>
> "The issues become most complex upon consideration of the double jeopardy implications of the juvenile court's decision to refer the juvenile for prosecution as an adult. Because of its unique attributes and impact, this decision must not be resolved by a reflexive and unreflective application of the double jeopardy prohibition against successive prosecutions. Despite the ease with which double jeopardy doctrines apply to simple re-prosecution as a delinquent, trial as an adult after a delinquency proceeding is not amenable to a simplistic analysis. To resist the temptation to impose the double jeopardy prohibition automatically in the complex context of referral for adult prosecution, it is necessary to stress the

> importance and impact on the juvenile of the decision to try him as an adult. Most important, the actual consequences and impact of his interests and those of the juvenile court must be clearly perceived. The Supreme Court may well discover that the resolution of these issues is more difficult than the problems encountered during its earlier efforts at constitutional domestication." Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings,* 6 U. Tol. L. Rev. 1, [illegible] (1974).

Petitioner Breed submits that the resolution of the issue presented here—whether due process requires that pretransfer delinquency proceedings in juvenile court be treated as a prior jeopardy—can only be accomplished by the balancing of two important, but competing interests. The first is the interest of the juvenile in being treated with fundamental fairness at all levels. This interest can best be analyzed by superimposing the established principles of double jeopardy on the transfer process (1) to see if the policies behind the Sixth Amendment guarantee apply and (2) to determine whether any of the recognized exceptions to the application of double jeopardy are apparent.

The second interest which must be considered is the effect which the application of double jeopardy to transfer proceedings would have on "the juvenile court's assumed ability to function in a unique manner." *McKeiver v. Pennsylvania, supra,* 403 U.S. at 548. Although the issue is the nature of due process to be accorded in adult criminal court, the Court should not overlook the possibility that its decision may have a collateral, yet significant effect on the future operations of the juvenile court. That effect should be considered in assessing the jeopardy consequences of pretransfer delinquency proceedings, especially since a juvenile court delinquency proceeding is only "comparable in seriousness to a felony prosecution" but has not yet been fully equated to it. *In re Gault, supra,* 387 U.S. at 36. A final reason why this consideration is important is this Court's expressed reluctance "to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young. . . ." *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547.

Since respondent Jones claims that double jeopardy barred his trial and conviction as an adult as distinguished from a second proceeding in juvenile court, the factual context of this case does not present the proper occasion for deciding whether the double jeopardy clause of the Fifth Amendment is "fully applicable to juvenile proceedings." As will be presently shown, even if it were assumed that jeopardy attached at some point during the juvenile proceedings prior to transfer, the transfer procedure involved here did not violate the proscription against double jeopardy as explicated in the decisions of this Court. Furthermore, the application of double jeopardy to preclude a juvenile's trial as an adult after transfer would, in effect, prohibit the use of transfer as a dispositional alternative in all future cases. Such an effect would be so detrimental to the juvenile court's ability to function in its unique manner that due process should not require this result.

II

The Proscription Against Double Jeopardy Is Not Violated by a Transfer of a Juvenile for Trial as an Adult After a Delinquency Adjudication in Juvenile Court

The procedure of waiving jurisdiction and ordering an adult criminal trial is *sui generis* to the juvenile court. Having no analogue in adult proceedings, this unique transfer procedure violates none of the policies served by the Fifth Amendment guarantee against double jeopardy. Insofar as it is similar to any aspects of double jeopardy as applied in criminal cases, it presents an exceptional situation where a second trial would be permitted.

A. The Transfer Procedure Violates None of the Policies Behind the Double Jeopardy Proscription

This Court has stated that the Fifth Amendment guarantee against a defendant's being placed "twice in jeopardy" furthers three separate constitutional policies: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). An analysis of each of these three policies will demonstrate that none of them would be furthered by applying double jeopardy as a bar to the adult criminal trial of a juvenile in the transfer situation presented here.

The classic formulation of the first policy, which forbids reprosecution after acquittal, was set forth by this Court in *Green v. United States,* 355 U.S. 184, 187-88 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Certainly this policy is not offended under the facts of this case. Since the juvenile court sustained the allegations of the delinquency petition in respondent Jones' case, its action is more comparable to a conviction than an acquittal. Even more importantly, Jones' trial as an adult was not a repeated attempt to convict which enhanced "the possibility that even though innocent he [might] be found guilty." The State had already established respondent Jones' "guilt" beyond a reasonable doubt at the adjudicatory hearing in juvenile court. (*See* App. pp. 17-19.) Indeed, far from being a repeated attempt to convict, Jones' trial as an adult gave him a second opportunity to avoid liability for his criminal act. As one commentator has observed in this context, "[t]he juvenile, not the state, has a second bite at the apple of acquittal." Carr, *supra,* 6 U. Tol. L. Rev. at 45. Since the Fourteenth Amendment

does not require that delinquency hearings conform to all the requirements of a criminal trial (*In re Gault, supra,* 387 U.S. at 30-31), Jones' second trial as an adult served the salutary purpose of affording him the additional constitutional guarantees, such as jury trial, to which he was not entitled when the facts were found adversely to him in juvenile court.

The second policy underlying the Fifth Amendment guarantee against double jeopardy is that it protects against a second trial for the same offense after conviction. This policy was expressed in *United States v. Ball,* 163 U.S. 662, 669 (1896) as follows:

> ". . . The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, *whether convicted or acquitted,* is equally put in jeopardy at the first trial." (Emphasis added.)

Hence double jeopardy bars a second conviction because a second conviction creates a risk of a second punishment for the same offense. In *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 173 (1874), Mr. Justice Miller, writing for the Court, used precisely this rationale to explain why reprosecution was barred following a conviction:

> ". . . Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it it not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution."

The risk of double punishment for the same offense is the only reason given by the drafters of the Model

Penal Code for barring a second prosecution where a former prosecution resulted in a conviction. *Model Penal Code* § 1.09(3), Comment (Tent. Draft No. 5, 1956). The comment in support of this provision of the Model Penal Code states:

> "There need be no inquiry as to whether the judgment of conviction is on the merits. The reason is that so long as the judgment remains unreversed and not vacated, the defendant is subject to punishment pursuant to it and ought not, while it stands, be subjected to a subsequent prosecution for the same offense." (*Id.* at 51.)

The only case cited in *North Carolina v. Pearce, supra,* 395 U.S. at 717 n. 12, as reflecting the double conviction aspect of the Fifth Amendment double jeopardy guarantee was *In re Nielsen,* 131 U.S. 176 (1889). That case does not indicate in any way that a double conviction, absent the risk of double punishment, is violative of the Fifth Amendment. Indeed, the *Nielsen* case is really an apt illustration of how double jeopardy operates to prohibit multiple convictions imposing multiple punishments for the same offense. *Nielsen* arose under the statutes enacted by Congress to suppress polygamy in the Utah Territory. In two separate indictments, returned on the same day, Nielsen was charged respectively with unlawful cohabitation and adultery. He pleaded guilty to the unlawful cohabitation charge and was sentenced for it. After serving this sentence, the adultery indictment came on for trial. The trial court rejected Nielsen's plea that the unlawful cohabitation conviction barred his conviction of this offense as well. Nielsen received a second prison sentence upon his conviction for adultery. This Court concluded that the unlawful cohabitation conviction in-

cluded the adultery charged in the second indictment and held that "To convict and punish him for that also was a second conviction and punishment for the same offense." (*Id.* at 187.)

As thus delineated, the double conviction protection afforded by the Fifth Amendment has no application here. No case decided by this Court has applied that rationale where the threat of a second conviction was not also accompanied by the concomitant risk of a second sentence. In this case, respondent Jones never faced the risk of more than one punishment. At the outset of delinquency proceedings, he faced the risk that the juvenile court might waive jurisdiction as its disposition of his case. The risk of waiver included, ultimately, the risk of a criminal sentence. In addition, once criminal proceedings began, Jones faced no threat of further juvenile court action bearing any similarity to a sentence. California Welfare and Institutions Code section 707 required the juvenile court to dismiss the petition so that no further disposition could be made. That procedure was followed here.

It should also be noted that the rule prohibiting reprosecution after conviction serves a secondary purpose which has been expressed by one commentator in these terms:

> ". . . Without the rule the prosecution could continue to prosecute until he found a judge willing to give an 'appropriate' sentence. And if the subsequent judge imposed his sentence cumulatively the defendant would be punished twice for the same offense. The double jeopardy rule forces the prosecutor to accept the first judge's decision on sentencing just as he must accept the first jury's verdict on guilt." Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 278 (1965).

The transfer procedures at issue in this case do not permit the prosecutor to shop around for a sentence that suits him. Only one disposition is possible: either a criminal sentence if the juvenile court waives jurisdiction and conviction follows, or placement in a facility or program available to the juvenile court if waiver is inappropriate. In either case, the juvenile court judge, and not the prosecutor, determines the alternative to be pursued.

The third policy embodied in the double jeopardy clause prohibits multiple punishments for the same offense. If there is any distinction between this policy and the policy forbidding reprosecution after conviction, it is that the latter policy operates where the risk of double punishment arises while the former comes into play when the risk becomes an actuality. This distinction is often blurred in the cases. It is readily apparent, however, that no problem of multiple punishment is involved in the transfer of a juvenile to adult court for trial. At the conclusion of criminal proceedings, only a single sentence can be imposed. In this regard, the transfer does not violate double jeopardy for the same reason that a preliminary hearing has no such effect; no punishment can accrue as the result of either proceeding. *See Carr, supra,* 6 U. Tol. L. Rev. at 45. *See also Collins v. Loisel,* 262 U.S. 426, 429 (1923).

Finally, it must be acknowledged that the transfer process subjects defendants, such as respondent Jones, to the ordeal of more than one trial. Yet a second trial, in and of itself, has never been held to violate double jeopardy without its having also violated one of the three policies discussed above. As this Court has observed in the mistrial context, "[t]he double-jeopardy provision of the Fifth Amendment . . . does not mean

that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade v. Hunter,* 336 U.S. 684, 688 (1949). A similar rule should obtain where juvenile proceedings result in a transfer rather than a final judgment.

B. At Most, the Transfer Procedure Involves a Single, Continuing Jeopardy.

In upholding the prosecution's right to retry an accused after a reversal on appeal, this Court has ". . . formulated a concept of continuing jeopardy that had application where criminal proceedings against an accused have not run their full course." *Price v. Georgia,* 398 U.S. 323, 326 (1970). In the instant case, it is obvious that the proceedings against respondent Jones did not "run their full course" at the point the juvenile court waived jurisdiction; those proceedings were merely transferred to another forum in which his case was pursued to its conclusion. By analogy then, it should logically follow that respondent Jones' criminal trial was constitutionally permissible under the "continuing jeopardy" principle.

This view was the approach adopted by the California Court of Appeal and the United States District Court when this case was before each of them. (*See* Appendices B and C to Pet. for Cert.) The California Court of Appeal observed:

> ". . . [n]o *new* jeopardy has arisen by the proceedings sending the case to the criminal court. The entire Juvenile Court Law contemplates a careful determination, on a case-by-case basis, as to the type of procedure most likely to protect society and to rehabilitate the minor. Under some

> circumstances, a minor will go from the criminal court to the juvenile court; in other cases he will go from the juvenile court to the criminal court. But, until one court or the other reaches a final disposition of the case, only a single jeopardy is involved." *In re Gary Steven J.*, 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185, 1972). (Footnote omitted.) *See* Appendix C to Pet. for Cert., pp. 26-27.

Subsequently the California Supreme Court approved the Court of Appeal's application of the concept of continuing jeopardy to transfer proceedings. *Bryan v. Superior Court,* 7 Cal. 3d 575, 583, 102 Cal. Rptr. 831, 836, 498 P.2d 1079, 1084 (1972).

None of the reasons given by the Ninth Circuit for its rejection of the "continuing jeopardy" approach should be persuasive in this forum. The Ninth Circuit distinguished this case from the traditional continuing jeopardy cases by stating:

> "First, the trial in adult court does not follow as a result of an appeal taken by the minor from his juvenile court conviction, but is a retrial for the same offense initiated by the state. Continuing jeopardy allows retrial following an appeal initiated by the defendant claiming error in his first conviction. If the conviction is reversed, retrial must be in the same court as the first trial." *Jones v. Breed, supra,* 497 F.2d at 1167. *See* Appendix A to Pet. for Cert., p. 13.

In the foregoing passage, the Court of Appeals does little more than confine the "continuing jeopardy" principle to the narrow factual context on which it was developed. It is, however, the genius of our common

law system that old principles may be applied to new, but analogous situations as the occasion arises. When reasoning thus by analogy, one can hardly expect the old factual situation to be identical to the new context to which the enduring principle is applied. If it were otherwise, there would be no growth of the law, merely the application of static principles to repetitious fact patterns. As Mr. Justice McKenna once aptly stated:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions." *Weems v. United States,* 217 U.S. 349, 373 (1910).

What is important here is that the juvenile court transfer procedure bears sufficient similarity to the retrial-after-appeal situation as to permit the application of common principles. The fact that some details of the unique juvenile procedure do not dovetail perfectly with the retrial model is immaterial. As one commentator astutely put the matter:

> "The Ninth Circuit's reading of the cases upon which it relies, though technically correct, can arguably be faulted as 'the application of [a] mechanical formula . . .' to determine double jeopardy questions. The distinguishing factors—new charge, new court—between the transfer situation and previously decided continuing jeopardy cases raise rather than answer the question of the impact of the double jeopardy clause. When these differences appear, the issue becomes whether the

> exception is limited only to situations in which equivalent facts are replicated. Certainly the fact that the criminal trial is upon a new charging document cannot be crucial as any charging paper is merely notice of the offense which the state will attempt to prove against the defendant. As such, charging papers may often be amended, withdrawn, re-filed or otherwise altered during the course of a proceeding. In the transfer context, the crucial factor is that the offense charged remains the same in both courts. The form in which the charge is made should have no double jeopardy significance as it does not in other contexts in which trial on a new indictment is allowed." Carr, *supra,* 6 U. Tol. L. Rev. at 43-44

The Supreme Judicial Court of Massachusetts has employed similar reasoning in holding that the dismissal of the juvenile complaint as part of a transfer does not preclude the application of the continuing jeopardy doctrine. The court stated:

> ". . . To be sure, the juvenile complaint is dismissed. However, by statute an adult complaint must be issued forthwith. G.L. c. 119, §75. The dismissal of the juvenile complaint and the issuance of an adult complaint are contemplated by the statute (G.L. c. 119, § 75) to be in effect one event, and, as such, any jeopardy to which a juvenile was initially subjected under the juvenile complaint continues under the adult complaint." *In re a Juvenile,* Mass. , , 306 N.E.2d 822, 829 (1974).

Nor does the fact that the second trial takes place in a different court make a significant difference. If

the judgment in a criminal case is reversed because of inflammatory pretrial publicity, double jeopardy would not appear to bar a retrial in a court of a different county if community hostility toward the defendant had not abated. Nor would it appear to bar retrial in a different court where a reversal was based on a finding of judicial misconduct so flagrant that there was every likelihood of its recurrence at a second trial before the same judge. In any event, a difference in the trial forum is hardly critical for double jeopardy purposes so long as the proceedings in the first court ". . . have not run their full course." *Price v. Georgia, supra,* 398 U.S. at 326.

In addition, it should be noted that *continuing* jeopardy does not mean *continuous* jeopardy. In the cases involving retrial after appellate reversal, the defendant is not in continuous jeopardy from the moment jeopardy attaches at his first trial until entry of judgment at the second trial. There is a gap in jeopardy between the date of reversal and the date of empaneling of the jury at his second trial. If it is assumed that jeopardy attached at some point during the delinquency proceedings, there was a similar gap in jeopardy between the moment of transfer and the attachment of jeopardy at respondent Jones' criminal trial. At the intervening preliminary hearing, respondent Jones was not in jeopardy. *Collins v. Loisel,* 262 U.S. 426, 429 (1923). Such a gap in jeopardy does not, however, defeat the application of the continuing jeopardy principle since the crux of the principle is that the second trial involve no new jeopardy.

Therefore, even if one assumes that jeopardy attached at some point prior to transfer, respondent Jones' trial as an adult was not prohibited by the

Sixth Amendment guarantee against double jeopardy because he faced the possibility of only a single criminal sentence from the inception of juvenile proceedings until the entry of judgment in superior court. Such a case is properly within the principle of continuing jeopardy. Indeed, the Ninth Circuit implicitly recognized this principle in its remand order to the district court:

> "We reverse with directions for the district court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either to set him free or remand him to the juvenile court for disposition." *Jones v. Breed, supra,* 497 F.2d at 1168. *See* Appendix A to Pet. for Cert., p. 15.

The possibility of a further disposition in juvenile court reflects at least a subconscious awareness that the pretransfer proceedings in juvenile court had not "run their full course." The possibility of such further dispositional proceedings is clearly inconsistent with a holding that there was a completed prior jeopardy which barred the adult prosecution.

C. This Case Does Not Violate the Rule of Waller v. Florida.

In *Waller v. Florida,* 397 U.S. 387 (1970), this Court held that double jeopardy barred the successive prosecution of a defendant in a state court when he had previously been tried for the same offense in municipal court. The Ninth Circuit felt that *Waller* required the application of double jeopardy in this case:

> ". . . transfer following the adjudicatory hearing would essentially allow the minor to be tried for one offense in two courts created by the same state in violation of the principles enunciated in Waller

v. Florida and Ashe v. Swenson. The juvenile courts are a separate court system from the adult courts and once a minor has been placed in risk of conviction he cannot be retried. Although trial in both the juvenile and the adult court may not result in separate punishment, double jeopardy protects [*sic*] double risk of conviction, not just double risk of punishment." *Jones v. Breed, supra,* 497 F.2d at 1167. *See* Appendix A to Pet. for Cert., pp. 13-14.

Petitioner Breed submits that *Waller v. Florida* is readily distinguishable from the instant case. Most importantly, *Waller* did not involve a transfer from one court to another. Professor Carr of the University of Toledo College of Law succinctly delineates the importance of this difference:

". . . In *Waller* there was no decision in the first court that additional proceedings should commence in a second court. There was no judicial decision bridging the gap between courtrooms, as there is in the transfer situation. Rather, there was a unilateral prosecutorial decision, which followed completion of clearly independent proceedings in the first court. The decision of the prosecuting attorney to indict Waller did not depend upon prior judicial action or concurrence. In the transfer context, no criminal prosecution can occur without the consent of the juvenile court judge embodied in a transfer order." Carr, *supra,* 6 U. Tol. L. Rev. at 44.

In *Waller* the apparent reason for the felony indictment was to obtain a greater sentence than that already imposed in the municipal court. This effort to obtain

cumulative punishments clearly violated the multiple punishment prohibition of the double jeopardy clause. In its opinion, the Ninth Circuit acknowledged that trial in both the juvenile and adult courts would not result in separate punishment. *Jones v. Breed, supra,* 497 F.2d at 1167. *See* Appendix A to Pet. for Cert., p. 13.

III

The Application of Double Jeopardy to Preclude Transfer as a Dispositional Alternative Would Have an Adverse Effect on the Juvenile Court's Ability to Function in Its Unique Manner

In its decisions applying due process to juvenile court proceedings, this Court has evinced concern that the application of a particular right in this setting should not impair the ability of the juvenile court to pursue the goals which led to its creation and separate existence. Most recently, in *McKeiver v. Pennsylvania,* 403 U.S. 528, 545 (1971), this Court concluded that due process did not require trial by jury at the adjudicative stage of juvenile court proceedings. The interests served by the right to a jury trial were held to be outweighed by the fact that:

". . . The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function, and would contrarily, provide an attrition of the juvenile court's ability to function in a unique manner." *Id.* at 547.

A similar balancing approach should be applied in this case should this Court conclude that the principles of Fifth Amendment double jeopardy would otherwise bar a transfer to adult court after a delinquency ad-

judication. Although respondent Jones was entitled to the "twice in jeopardy" protection of the Fifth Amendment at his criminal trial, the resolution of the double jeopardy issue presented here will have a profound effect on future juvenile court proceedings. If double jeopardy were held to prohibit a juvenile's trial as an adult in all cases where an adjudication of delinquency had been commenced or completed prior to transfer, such a holding would effectively mandate transfer prior to the adjudicatory hearing or not at all. Conversely, such an application of double jeopardy in adult proceedings would abrogate the use of transfer as one of the dispositional alternatives open to the juvenile court after a finding of delinquency. Petitioner Breed submits that this result would diminish the fiexibility and informality of juvenile court proceedings without conferring any additional due process benefits upon juveniles charged with delinquent acts.

A. A Cumbersome Preliminary Hearing Procedure Would Be Engrafted Onto the Juvenile Court Structure

The National Advisory Commission on Criminal Justice Standards and Goals has recently reported:

> "There is general agreement that there are some juveniles for whom the special features of juvenile cases are not appropriate. The family court should have authority to transfer those cases to the trial court of general jurisdiction or the criminal division of that court, where the juvenile will be prosecuted as an adult. This authority exists in today's juvenile courts, although it is sometimes described as the power to transfer the case to adult court, to certify a case to adult court or to waive the juvenile court's jurisdiction. The Commission

> believes that the family court with jurisdiction over delinquent juveniles should have this authority." National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts*, Commentary to Standard 14.3, p. 300 (1973).

There also appears to be general agreement that double jeopardy would be no bar to transfer if the transfer or fitness hearing preceded the hearing on the merits of the delinquency petition. *See, e.g.*, Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 Wm. & Mary L. Rev. 266, 300 (1972); Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. Rev. 1, 24-25 (1974). Under these circumstances, the transfer or fitness hearing would be analogous to a preliminary hearing in adult criminal proceedings because no disposition similar to a sentence could result from such a hearing. It is well established that jeopardy does not attach at a preliminary hearing. *United States v. Levy*, 268 U.S. 390, 393 (1925); *Collins v. Loisel*, 262 U.S. 426, 431 (1923). The fact that a pre-adjudication transfer hearing would clearly avoid any double jeopardy problem does not, however, mean that transfer should be limited to that stage of the proceedings. As Mr. Justice Cardozo had occasion to remark in the criminal setting, a state's "procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In the instant case, elimination of transfer as a dispositional alternative would be neither fairer nor wiser nor would it necessarily give surer protection to the minor who stands to lose the benefits of treatment as a juvenile.

If transfer is barred as a dispositional alternative to probation or placement in a juvenile facility, states such as California must adopt a preliminary hearing procedure in all juvenile court cases to determine *at the outset* (1) whether the minor alleged to be delinquent is amenable to treatment as a juvenile or (2) whether he should be tried as an adult. Such a procedure is reminiscent of the command of the Red Queen in Lewis Carroll's *Alice in Wonderland:* "Sentence first—verdict afterward." As one commentator has expressed this point:

> "A problem created by the conclusion that double jeopardy applies to juvenile court proceedings is that the necessity of deciding whether to waive jurisdiction to the criminal court before the question of guilt is determined may hinder the desirable procedure of the juvenile correctional system. This problem arises because of the accepted principles that the offender should be waived to criminal court only after a social study to determine that he cannot be adequately treated in the juvenile court system, and that no social study should be conducted prior to determination that the accused is guilty of the alleged offense. Obviously, the juvenile court judge can make an intelligent decision regarding waiver only after a social study has been conducted. But a social study, which in many ways resembles a pre-sentence investigation in criminal procedure, may seriously harm a child's reputation, as well as that of his parents, and the innocent child should be protected against such possible stigma and invasion of his privacy whenever possible." Note, *Double Jeopardy Applied to Juvenile Proceedings,* 43 Minn. L. Rev. 1253, 1257-58 (1959). (Footnotes omitted.)

A preliminary fitness or transfer hearing would require the juvenile court judge to focus on disposition considerations before there has been an adjudicatory hearing on jurisdiction ("guilt"). The California Supreme Court has pointed out the basic unfairness of this approach in holding that the juvenile court commits reversible error under state law by reviewing the probation officer's social study report on disposition before determination of the issue of jurisdiction. The court has stated:

> "The history of [California] Welfare and Institutions Code sections 701, 702, and 706 clearly indicates that the Legislature intended to create a bifurcated juvenile court procedure in which the court would first determine whether the facts of the case would support the jurisdiction of the court in declaring a wardship and *thereafter* would consider the social study report at a hearing on the appropriate disposition of the ward. This procedure affords a necessary protection against the premature resolution of the jurisdictional issue on the basis of legally incompetent material in the social report." *In re Gladys R.,* 1 Cal. 3d 855, 859-60, 83 Cal. Rptr. 671, 674-75, 464 P.2d 127, 130-31 (1970). (Brackets added; footnotes omitted.)

The purpose of requiring separate considerations of wardship and of disposition was to prevent the court from being affected, at the first stage, by evidence of the minor's character not relevant to the determination of his "guilt." *In re Gary Steven J.,* 17 Cal. App. 3d 704, 708, 95 Cal. Rptr. 185, 188 (1971). To avoid this potential for prejudice if preliminary fitness hearings were mandatory, the judge who presided at the

preliminary fitness hearing would have to be disqualified from sitting at the subsequent jurisdictional hearing if the minor was found to be amenable to treatment as a juvenile. *See Donald L. v. Superior Court*, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853, 498 P.2d 1098, 1101 (1972). The statutes of three ~~stages~~ states require the reassignment of the case to a second judge whenever transfer is rejected at the outcome of a preliminary fitness hearing. Fla. Stat. Ann. § 39.09(2)(g) (1974); Tenn. Code Ann. § 37-234(e) (Supp. 1973); Wyo. Stat. § 14-115.38(c) (Supp. 1973).

Thus, the preliminary fitness or transfer hearing will add a third hearing in every juvenile court case where transfer is considered and rejected, whereas only two hearings—jurisdiction and disposition—need be held if transfer may constitutionally be treated as a dispositional alternative. Adding to delay at the very least will be the requirement that a different judge preside at the fitness and jurisdiction hearings. These additional burdens on the resources of the juvenile court can only serve to increase already overcrowded dockets. One study has concluded:

> "All available evidence shows that most juvenile courts face a continuing overload stituation, in which they cannot handle more than a small proportion of all potential cases because of resource and manpower limitations." Vinter, "The Juvenile Court as an Institution," in Appendix C to President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 87 (1967).

The magnitude of the increased burden of having different judges preside at fitness and jurisdiction

hearings can only be suggested because petitioner has been unable to discover any published statistics on the number of delinquency cases in which the question of transfer is considered. The problem will probably be most acute in smaller counties where only a single judge presides over the juvenile court in addition to other duties. But even in multi-judge urban counties, the problem would doubtless be substantial. In Los Angeles County during 1974, for example, there were only five superior court judges and 24 commissioners sitting as referees in the juvenile court. This limited staff processed 14,094 delinquency petitions in 1972. Bureau of Criminal Statistics, Calif. Dept. of Justice, *Crime and Delinquency in California, 1972—Reference Tables: Adult and Juvenile Probation*, Table 31, p. 98 (1973).

Furthermore, the preliminary fitness hearing cannot be too preliminary—in the sense of being summary—if it is to be fair. Under California law, the nature of the crime allegedly committed, the circumstances and details surrounding its commission, and the minor's degree of sophistication in relation to criminal activities are factors which may be considered by the juvenile court in the exercise of its discretion to certify a minor to the superior court as not amenable to treatment as a juvenile. *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 715-16, 91 Cal. Rptr. 600, 604, 478 P.2d 32, 36 (1970). Three other states specifically require a finding of delinquency before the juvenile court can transfer the case. Ala. Code Tit. 13, § 364 (1958); Mass. Dist. Ct. R. 85A (1974); W. Va. Code Ann. § 49-5-14 (1966). The District of Columbia statute, which this court examined in *Kent v. United States*, 383 U.S. 541 (1966). contained a requirement that the juvenile court must conduct a "full investigation" before order-

ing a transfer. D.C. Code § 11-914 (1961), now § 11-1553 (Supp. 1965). Several other statutes also require that an "investigation" or a "full investigation" precede transfer. *See* Ala. Code, Tit. 13, § 364 (1958); Idaho Code § 16-1806 (Supp. 1971); Hawaii Rev. Stat. § 571-22 (1973); Ind. Ann. Stat. § 9-3214 (Supp. 1972); Mich. Comp. Laws Ann. § 712A.4 (Supp. 1972); Miss. Code Ann. § 7185-15 (1953); Nev. Rev. Stat. § 62.080 (1969); N.H. Rev. Stat. Ann. § 169.21 (1964); Okla. Stat., Tit. 10, § 1112(b) (1971); R.I. Gen. Laws Ann. § 14-17 (Supp. 1971); W.Va. Code Ann. § 16.1-176 (Supp. 971).

These judicial and statutory criteria for transfer indicate that pre-adjudication transfer hearings will not necessarily be short, inconsequential additions to present juvenile court calendars. Indeed, it is reasonable to expect that these hearings will be as vigorously contested as any hearing on the merits of the delinquency petition because in these proceedings the minor stands to lose the unique benefits of treatment as a juvenile. For this reason, the National Advisory Commission on Criminal Justice Standards and Goals has contemplated a full-dress, adversary hearing on the issue of transfer:

> "No order directing trial as an adult should be entered unless the family court has held a full and fair hearing on the matter. The prosecutor should have the authority to request that a case be tried as an adult prosecution, but the family court should be able to raise the matter as well. At the hearing, the juvenile should be accorded substantially the same rights as an adult, except that the decision should not be made by a jury. Thus the juvenile should be represented by counsel, have access to all of the information considered by the court, have the right to confront and cross-examine those testifying in favor of processing the case as an adult prosecution, and have the right to present evidence against having the case so processed." *Report on Courts, supra,* Commentary on Standard 14.3, pp. 300-301.

Moreover, in states like California, the juvenile courts will essentially have to conduct two full trials before two different judges in each case where the issue of transfer is resolved in favor of the minor prior to the adjudication hearing. Under *Jimmy H. v. Superior Court, supra,* 3 Cal. 3d at 715-16, 91 Cal. Rptr. at 604, 478 P.2d at 36, the juvenile court may consider the nature of the crime allegedly committed, the circumstances and details surrounding its commission, and the minor's degree of sophistication in relation to criminal activities. Although the question of guilt or innocence *per se* is not before the juvenile court at the transfer hearing (*see Brown v. Cox,* 481 F.2d 622, 631 [4th Cir. 1971]), consideration of the foregoing factors will necessarily involve the presentation of much of same evidence which both sides would normally introduce at the hearing on the merits of the delinquency petition. Only by hearing such duplicative evidence can the juvenile court make an informed determination as to whether the offense is so premeditated, willful, aggravated or heinous that the minor should lose the benefits of a juvenile court disposition.

Of course, the juvenile court can avoid such obviously duplicative hearings by conducting less than a full investigation into the propriety of transfer. A number of states permit transfer solely on a finding of

probable cause to believe that the minor has committed the delinquent conduct alleged in the petition. *See* Rudstein, *supra,* 14 Wm. & Mary L. Rev. at 298-99 n. 132. Use of such a standard obviates the need to resolve conflicts between the evidence presented by the prosecution and defense. It enhances the ability of the prosecution to select the forum in which the juvenile will be tried. It also increases the risk that innocent minors will be tried as adults in response to community pressure. *See* Carr, *supra,* 6 U. Tol. L. Rev. at 79-80. Even if the minor is found amenable to treatment through the facilities available to the juvenile court, the lack of a "full investigation" heightens the probability that some minors will be retained in the juvenile court system who would have been screened out by a more thorough transfer hearing. These youths may frustrate the rehabilitation of other minors by their very presence in the system, and they may prove a threat to the proper functioning of juvenile institutions in other ways. Thus, the vice of a truncated, preliminary fitness hearing is that it is fraught with the increased potential for critical mistakes regardless of the outcome of the transfer hearing. More importantly, since the minor may not receive the full and fair hearing which this Court contemplated in *Kent v. United States,* 383 U.S. 541 (1966), such summary procedures may offend due process.

Therefore, if double jeopardy mandates that the question of transfer must inflexibly be considered at a hearing preliminary to the adjudication of delinquency, the proponents of this view must confront an inescapable dilemma. On the one hand, if they argue that the preliminary fitness hearing will be a short affair consuming little additional court time, this alternative will present the danger that the hearing will be so abbreviated as to offend due process while minimizing the ability of the juvenile court to screen out through the transfer mechanism youths who should not be in its rehabilitative programs. On the other hand, if the preliminary fitness hearing is conducted as it should be, it will essentially duplicate much of the testimony and other evidence that would be presented at the hearing on the merits of the delinquency petition. In this latter event, the application of double jeopardy to compel this result will ". . . burden the juvenile courts with a procedural requirement that will make juvenile adjudications significantly more time-consuming, or rigid." *In re Winship,* 397 U.S. 358, 375 (1970) (concurring opinion of Mr. Justice Harlan). On balance, neither alternative affords the juvenile court the flexibility it possesses where transfer may be used as a dispositional alternative. As in the present case, a single judge may acquaint himself with the nature of the crime and the circumstances surrounding its commission at the adjudicatory hearing. Having the benefit of the knowledge gained at the adjudicatory hearing, the judge may consider the question of transfer in a manner less time-consuming and more consistent with the ends of due process and the juvenile court system.

B. The Weight of Authority Favors Transfer as a Dispositional Alternative of the Juvenile Court

In both *Gault* and *McKeiver,* this Court considered existing state practices, as reflected by statutes and judicial opinions, in determining whether due process demanded the application of a particular constitutional right in the juvenile court context. *In re Gault, supra,* 387 U.S. at 37-38; *McKeiver v. Pennsylvania,* 402

U.S. at 548. Although the fact that a practice is followed by a large number of states is not conclusive as to whether that practice accords due process, this Court has held that it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Leland v. Oregon,* 343 U.S. 790, 798 (1962); *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934). It is therefore significant that the majority of states permit the transfer of a juvenile for trial as an adult after the point at which jeopardy would have attached under similar circumstances in criminal proceedings. The majority of courts and all of the states which have legislated on the subject treat transfer after the commencement of the adjudicatory hearing as an exception to double jeopardy.

At least 43 jurisdictions within the United States have provisions in their juvenile court statutes which permit waiver of jurisdiction over certain juveniles found unfit for treatment in the facilities available to the juvenile court. *See* Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 Wm. & Mary L. Rev. 266, 297 n.128 (1972). Of these jurisdictions, 28 states either make no mention of when transfer to the criminal courts can occur or expressly permit transfer after an adjudication of delinquency has begun. Ala. Code Tit. 13, § 364 (1958); Alaska Stat. § 47.10.060 (1971); Ariz. Juv. Ct. R. 12 (Supp. 1971); Cal. Welf. & Inst'ns Code § 707 (West Supp. 1972); Colo. Rev. Stat. Ann. §§ 22-1-4(4)(a), 22-3-8 (Supp. 1969); Conn. Gen. Stat. Ann. § 17-60a (Supp. 1972); Hawaii Rev. Stat. § 571-22 (Supp. 1973); Idaho Code § 16-1806 (Supp. 1974); Ind Ann. Stat. § 31-5-7-14 (Supp. 1973); Iowa

Code Ann. § 232-72 (1969); Kan. Stat. Ann. § 38.808 (1973); Ky. Rev. Stat. Ann. § 208.170 (1972); Me. Rev. Stat. Ann. Tit. 15, § 2611(3) (1964); Mass. Gen. Laws Ann. ch. 119, § 61 (1965); Mich. Stats. Ann. § 27.3178 (598.4) (Supp. 1974); Minn. Stat. Ann. § 260-125 (1971); Miss. Code Ann. § 7185-15 (1953); Mo. Ann. Stat. § 211.071 (1962) (as interpreted in *Carter v. Murphy,* 465 S.W.2d 28 [Mo. Ct. App. 1971]); Nev. Rev. Stat. § 62.080 (1969); N.J. Rev. Stat. § 2A; 4-48 (Supp. 1974); Okla. Stat. Tit. 10, § 1112 (1974); Ore. Rev. Stat. § 419.507 (1973); R.I. Gen. Laws Ann. § 14-1-7 (Supp. 1973); S.C. Code Ann. § 15-1281.13 (1962); S.D. Compiled Laws Ann. § 26-8-22.7 (Supp. 1971); Utah Code Ann. § 55-10-86 (1974); W.Va. Code Ann. § 49-5-14 (1966); Wis. Stat. Ann. § 48.18 (Supp. 1972). For double jeopardy purposes, it does not matter whether the delinquency hearing has been completed or merely commenced. If this hearing is compared to the criminal trial, jeopardy will have attached. A defendant is placed in jeopardy in a criminal proceeding once the defendant is put on trial before the trier of facts, whether the trier is a jury or a judge. *United States v. Jorn,* 400 U.S. 470, 479 (1971).

Five states, including the populous states of California and Pennsylvania, permit the juvenile court to waive jurisdiction after a finding of delinquency. Ala. Code Tit. 13, § 364 (1958) (as interpreted in *Seagroves v. State,* 279 Ala. 621, 189 So.2d 137 [1966]); Cal. Welf. & Inst'ns Code § 707 (West. Supp. 1972); Mo. Ann. Stat. § 211.071 (1962) (as interpreted in *Carter v. Murphy,* 465 S.W.2d 28 [Mo. Ct. App. 1971]); Ore. Rev. Stat. § 419.507 (1971); W.Va. Code Ann. § 49-5-14 (1966). Only 15 jurisdictions provide

that the fitness or transfer hearing must be held prior to a hearing on the merits of the delinquency petition. D.C. Code § 16-2307 (Supp. V 1972); Fla. Stat. Ann. § 39.09(2) (1974); Ga. Code Ann. § 24A-2501 (1971); Ill. Rev. Stat. ch. 37, § 702-7(3) (Supp. 1972); Md. Ann. Courts and Jud. Proc. Code § 3-816 (Supp. 1974); N.H. Rev. Stat. Ann. § 169.21 (1964); N.M. Stat. Ann. § 13-14-27 (Supp. 1973); N.C. Gen. Stat. § 7A-280 (1969); N.D. Cent. Code § 27-20-34 (1974); Ohio Rev. Code Ann. § 2151-26 (Page Supp. 1971); Pa. Stat. Ann. Tit. 11, § 50-325 (1974); Tenn. Code Ann. § 37-234 (Supp. 1971); Tex. Code Ann., Family Code, § 54.02 (1973); Va. Code Ann. § 16.1-176.2 (1973); Wyo. Stat. Ann. § 14-115.38 (Supp. 1971).

Those courts which have considered the issue have concluded that a criminal prosecution subsequent to an adjudication delinquency does not violate the protection against double jeopardy. *Bryan v. Superior Court,* 7 Cal. 3d 575, 580-83, 102 Cal. Rptr. 831, 834-36, 498 P.2d 1079, 1082-85 (1972); *In re Gary Steven J.,* 17 Cal. App. 3d 704, 709-10, 95 Cal. Rptr. 185, 189-90 (1971); *In re a Juvenile,* Mass. , 306 N.E.2d 822, 828-30 (1974); *Carter v. Murphy,* 465 S.W.2d 28, 31-32 (Mo. Ct. App. 1971); *In re Mack,* 22 Ohio App. 2d 201, 204, 260 N.E.2d 619, 621 (1970). *See also United States v. Dickerson,* 271 F.2d 487, 491 (D.C. Cir. 1959).

Thus, since the majority of jurisdictions permit the transfer of a juvenile for prosecution as an adult after the point at which jeopardy would normally attach in criminal proceedings, it cannot be said that the use of transfer as a dispositional alternative of the juvenile court is a practice which "offends some principle of

justice so rooted in "the traditions and conscience of" our people as to be ranked as fundamental." *Snyder v. Massachusetts, supra,* 291 U.S. at 105.

Insofar as this Court may consider the recommendations of experts and various model acts as bearing on the requirements of due process in this case, it should be noted that neither the Uniform Juvenile Court Act nor the Standard Juvenile Court Act prohibit transfer after an adjudication of delinquency. *See Uniform Juvenile Court Act* § 34(a), 9 Uniform Laws Ann. 429 (master ed. 1973) (approved by National Conference of Commissioners on Uniform State Laws and American Bar Association in 1968); *Standard Juvenile Court Act* § 13 (6th ed., 1959) (prepared by Committee on Standard Juvenile Court Act of the National Council on Crime and Delinquency, in cooperation with the National Council of Juvenile Court Judges and the U.S. Children's Bureau). While the Children's Bureau has recommended that double jeopardy bar reprosecution for the same conduct in juvenile court, its recommendation does not expressly encompass the transfer situation and thus cannot be read as taking a definite position against transfer as a dispositional alternative. W. Sheridan, *Legislative Guide for Drafting Family and Juvenile Court Acts,* § 27 and comment (Dept. of H.E.W., Children's Bureau Pub. No. 437-1966). Only the Model Rules for Juvenile Courts require resolution of the transfer issue before commencement of the delinquency adjudication hearing. *Model Rules for Juvenile Courts,* Rule 9 (National Council on Crime and Delinquency, 1969). Since no reason is given for this recommendation in Rule 9, this provision of the Model Rules may simply reflect cautious draftsmanship to avoid any potential double jeopardy

problems rather than any consideration of the better view in terms of fairness to the juvenile.

Furthermore, the Model Rules contain no indication as to why this rule is at variance with Section 13 of the Standard Juvenile Court Act, also prepared by the National Council on Crime and Delinquency.

In summary then, there is no trend in the statutes, case law, or the recommendations of experts that clearly favors the application of double jeopardy to preclude transfer as a dispositional alternative. If there is a trend, it is one favoring flexibility which would permit the juvenile court judge to consider transfer either before, during or after the adjudication hearing according to the demands of the particular case. In a case where the juvenile does not contest the allegations of delinquency, it may be appropriate to consider the question of transfer first. But in a case where the allegations of the delinquency petition are contested and where a preliminary fitness hearing will be lengthy and potentially duplicative, the juvenile court judge should not be constitutionally foreclosed from considering transfer as a dispositional alternative. No other result would be consistent with this Court's reluctance "to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young. . . ." *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547.

Conclusion

For the foregoing reasons, petitioner Breed submits that respondent Jones' trial as an adult did not violate the Fifth Amendment guarantee against double jeopardy. Petitioner therefore urges that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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